87-1173

No. 87-

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

APPLICATION OF ADIRONDACK CHAIR CO., INC.,

Appellant,

v.

COMMISSIONER OF FINANCE,
OF THE CITY OF NEW YORK,

Appellee.

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF NEW YORK, APPELLATE DIVISION,
FIRST JUDICIAL DEPARTMENT

JURISDICTIONAL STATEMENT

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January 8, 1988

QUESTIONS PRESENTED

1. Is the use of a different standard by New York City in the imposition of its General Corporation Tax to determine whether a corporation is "doing business" within the City from that used to determine whether a corporation is "doing business" outside of the City, so as to be permitted an allocation, invalid under the Equal Protection Clause of the United States Constitution?

2. If not, is the denial of an allocation of the income of a corporation which is engaged in interstate commerce violative of the Commerce Clause of the United States Constitution since such income is subject to multiple taxation by several states?

DESIGNATION OF PARTIES

The Appellant and Appellees are identified in the caption appearing on the cover and at page one of this statement. Wholly owned subsidiary or affiliated companies of appellant, Adirondack Chair Co., Inc. are:

Architectural Fiberglass, Inc.

Business and Institutional Furniture Co., Inc.

Krueger, Inc.

Krueger Holdings, Inc.

Krueger Trucking, Inc.

Silvol Hardware, Inc.

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ON APPEAL FROM THE SUPREME COURT
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FIRST JUDICIAL DEPARTMENT

JURISDICTIONAL STATEMENT

Appellant, Adirondack Chair Co., Inc. ("Adirondack"), appeals from the final judgment of the Supreme Court of the State of New York, Appellate Division, First Judicial Department, dated April 9, 1987. The judgment of the Appellate Division confirmed the administrative decision of the appellee, Commissioner of Finance of the City of New York ("Finance"), which determined that Adirondack could not allocate its income for the General Corporation Tax ("General Tax") imposed by the City of New York. Finance based its administrative decision on its erroneous determination that the storage of inventories, from which deliveries were made to customers, at the warehouses of its vendors located outside of the State of New York, was not

the storage of merchandise to permit an allocation. In confirming, the Appellate Division sustained the denial of the allocation. Such a denial is impermissible under the Equal Protection and Commerce Clauses of the Constitution of the United States.

Opinions Below

The administrative decision of the City is not reported but is included in the appendix, starting at 7a.[1] The judgment of the Appellate Division was rendered without an opinion. The order of the Appellate Division is included in the appendix at 14a. The order of the Court of Appeals denying Adirondack's motion for leave to appeal is included in the appendix at 15a. The order of The Court of Appeals was not accompanied by an opinion.

Jurisdiction

The judgment of the Appellate Division upholding the denial of the right of Adirondack to allocate its income for the General Tax was entered on April 9, 1987. (14a) That judgment became the final judgment of the highest court in which review could be had on October 15, 1987, when the Court of Appeals entered an order denying the motion of Adirondack for leave to appeal. (15a) The notice of appeal to this Court was filed in the Supreme Court of the State of New York on December 23, 1987. (16a)

This appeal is being docketed in this Court within 90 days from October 15, 1987, the date of entry of the order of the Court of Appeals denying Adirondack's motion for leave to appeal. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(2).

Constitutional Provisions and Statutes

U.S. Const. art. I, §8, cl. 3:

> The Congress shall have Power . . . To regulate commerce with foreign nations, and among the several States and with the Indian tribes.

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[1] Numbers followed by the letter "a" refer to pages of the appendix hereto.

U.S. Const. Amendment 14, §1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The pertinent provisions of the General Tax, §R46-2.0 *et seq* of the New York City Administrative Code (for the years involved herein) appear in the appendix, starting at 3a.

Statement of The Case

Adirondack has its principal office located in New York and is primarily engaged in the business of catalog sales throughout the country, of furniture used in offices and institutions. Adirondack regularly maintained inventories at locations in New York City, Knoxville, Tennessee and Tupelo, Mississippi, from which deliveries were made to customers. The inventories in Knoxville, Tennessee and Tupelo, Mississippi were located at the warehouses of the vendors from which Adirondack had purchased the items stored. The quantity and description of merchandise stored at each such location was regularly confirmed to Adirondack which compared such data with its inventory records.

Adirondack filed General Tax returns for the taxable periods involved herein and claimed an allocation for each such period attributable to the fact that it maintained inventories outside of the City from which deliveries were made to customers. Adirondack did not pay income taxes to the States of Tennessee or Mississippi.

On September 2, 1983, Finance issued a Notice of Determination against Adirondack stating that there was a deficiency

of City Business Tax (Corporations) together with interest for the taxable periods ended September 30, 1979, December 31, 1979, December 31, 1980 and December 31, 1981 attributable to the denial of the allocation of the income. Adirondack, as required by law, filed a petition for a Formal Hearing with Finance to contest this deficiency, and such Hearing was held on March 28, 1984 and June 26, 1984.

The Decision Of Finance

On August 13, 1985, a decision was rendered by Finance that Adirondack was not entitled to an allocation since the warehouses at which Adirondack stored its inventories outside of the state were not public warehouses as required by its regulations. (7a)

JUDICIAL PROCEEDINGS

Adirondack instituted a judicial proceeding to review and annul the administrative determination of the Finance Commissioner. It was argued before the Appellate Division of the New York Supreme Court that: (i) the legislative history of the State tax law upon which the General Tax was modelled and the plain language of Finance's regulations clearly indicated that a taxpayer which regularly used a warehouse outside of the State in carrying on its business was entitled to allocate its income, and (ii) the denial of the right to allocate was violative of the Equal Protection and Commerce Clauses of the United States Constitution. Finance argued that Adirondack did not store merchandise outside of the state since there was no identification or segregation thereof, so that it was not entitled to allocation.[2]

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[2] In Finance's Decision there were Findings of Fact that there was no evidence adduced that Adirondack rented space in the vendors' warehouses or that the merchandise stored therein was kept separate or identifiable. On this basis Finance implied in its argument that Adirondack did not own such merchandise. There were also Findings of Fact that Adirondack (i) purchased the merchandise, (ii) stored such merchandise at the vendors' warehouses and (iii) was regularly advised by such vendors as to the quantity of the stock warehoused. If there was a "purchase" by Adirondack, there must have been an appropriation and segregation of goods. Moreover, there was no Finding that the merchandise stored was not kept separate or identifiable. Had the vendor-bailees commingled Adirondack's merchandise, it would have been a conversion and there was no evidence whatsoever that such bailees had breached the bailment contract. Thus the argument of Finance has no merit.

The Appellate Division confirmed the determination of Finance without an opinion. Adirondack then made a motion for leave to appeal to the New York Court of Appeals which was denied on October 15, 1987. Inasmuch as neither court rendered an opinion, the basis for confirming Finance's decision is not known.

The Questions Are Substantial

In Affirming The Decision of Finance, The State Court Allowed Finance To Use Two Standards Of The Term "Doing Business" Which Results In Corporations Engaged In Interstate Business To Be Subject To The Risk Of Multiple Taxation

The General Tax is imposed on general business corporations for the privilege of doing business or employing capital in the City of New York. This tax was modelled after the New York State Franchise Tax on General Business Corporations ("Corporation Tax") and the two tax laws and the regulations thereunder are very similar.[3]

Virtually from its inception in 1917 to the present the Corporation Tax has been imposed on any corporation "doing business" within the State which term has been defined to include any corporation which owns inventories (employs capital) stored within the State of New York, regardless of the nature of the premises where stored.

In 1928, the Corporation Tax was amended to provide that a corporation which had a "regular place of business" outside of the state was permitted an allocation. The history of the amendment indicates that the term "regular place of business"

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[3] The General Tax was authorized by the legislature of the State of New York in 1966, permitting the City to impose various taxes to be modelled after the State taxes. (Laws 1966, Chapter 772, §1). (1a) Prior to the taxable period involved herein the Corporation Tax was amended to permit an allocation regardless of whether a taxpayer either stored inventories or maintained an office outside of the state. The General Tax has not been so amended.

was intended to be construed as "taxable status" by which was meant that the corporation could be taxable by another state if such other state had the same tax laws as New York. Inasmuch as a corporation was subject to the Corporation Tax if it stored inventories in New York, it would have a "taxable status" in another state if it stored inventories therein. This requirement *to have* a "regular place of business" outside of the State as a prerequisite to being entitled to an allocation was continued and carried over to the General Tax.[4]

There is nothing inconsistent with such intent in Finance's regulations defining the term "regular place of business" (which definition had been used for the Corporation Tax) as follows:

> §4-11 Regular place of business
>
> * * *
>
> (b) A regular place of business is any bona fide office (other than a statutory office), factory, warehouse, or other space which is regularly used by the taxpayer in carrying on its business. Where as a regular course of business, property of the taxpayer is stored by it in a public warehouse until it is shipped to customers, such warehouse is considered a regular place of business of the taxpayer and where as a regular course of business, raw material or partially finished goods of a taxpayer are delivered to an independent contractor to be converted, processed, finished or improved and the finished goods remain in the possession of the independent contractor until shipped to customers, the plant of such independent contractor is considered a regular place of business of the taxpayer. * * *

[4] In 1944, the Corporation Tax was substantially revised and it was provided that a taxpayer was required "to maintain a regular place of business" in order to be permitted an allocation. However in 1945, the law as amended retroactively to the date of such revision to restore the words "to have". Thus, it is clear that a taxpayer need not *maintain* a "regular place of business" in order to be permitted an allocation.

The regulation specifically provides that a warehouse which is regularly used by a taxpayer in carrying on its trade or business is a "regular place of business". There is nothing to indicate that the warehouse has to be any more than "regularly used". There is no requirement that the "regular place of business" be rented, owned or staffed by taxpayer's personnel. The plain language of the regulation is amply clear that a taxpayer that regularly uses a warehouse (which is defined in Webster's dictionary as a place to store goods or wares) outside of the state is entitled to an allocation. The second sentence of such regulation further clarifies this by giving a public warehouse and the premises of an independent contractor as examples of "regular place of business" to show that there is no requirement to rent space, employ personnel or maintain an office.

1. **Finance's Distinction Between The Type Of Warehouse Is Arbitrary, Unreasonable, Irrational and Invidious.**

Despite this clarity, Finance has construed such regulation to mean that a "regular place of business" is either a warehouse *maintained* by the taxpayer or a public warehouse. In so doing, Finance has distinguished between the storage of inventories in a public warehouse and such storage in a warehouse of Adirondack's vendor. Since both of such warehouses are places to store goods or wares, this is an unreasonable distinction which violates the Equal Protection Clause of the United States Constitution. "But the classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." *F.S. Royster Guano Company v. Commonwealth of Virginia*, 453 U.S. 412, 415 (1920).

This distinction as to the type of warehouse is also not rational and is invidious under the standard of *United States Railroad Retirement Board v. Fritz*, 449 U.S. 166, 176 (1980) and *Jefferson v. Hackney, Commissioner of Public Welfare*, 406 U.S. 535, 546 (1972). In applying this rational basis standard, the inquiry is whether the classification is rationally related to the

achievement of the purpose of the statute. The purpose of imposing the requirement of a "regular place of business" outside of the state as a prerequisite to allocation was to permit an allocation when a taxpayer had the same nexus to another state that would cause it to be subject to the New York tax. Inasmuch as a corporation regularly storing inventories at any location in the City is subject to the General Tax[5], it would be consistent with the legislative purpose to permit an allocation to any corporation that stores inventories outside of the state. The distinction made by Finance between a private or public warehouse as a "regular place of business" is contrary to such intention and completely irrational.

2. The Denial of An Allocation To A Corporation Engaged In Interstate Commerce Subjects Such Corporation To The Impermissible Risk Of Multiple Taxation.

Adirondack is engaged in interstate commerce. It makes sales to customers located around the country and regularly stores inventories in three states. Inasmuch as a state may impose its tax on the income of a corporation which is engaged in interstate commerce, on the portion of such income attributable to its activities conducted therein, it is subject to tax in each of the states in which it conducts activities. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977). Furthermore, a state is not prohibited by P.L. 86-272 (5a) from imposing its tax on the income of a corporation which stores inventories therein. Accordingly such corporation must be permitted an allocation to avoid the risk of multiple taxation inasmuch as is carrying on activities in several states and subject to the taxes imposed thereby.

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[5] It is provided in Section 4 of Information Bulletin No 2-A, "General Corporation Tax - Taxable Status", issued by N.Y. City Finance Administration, August 1973: Employing Capital. — A domestic or foreign corporation employing capital in New York City is subject to the tax. Any of a large variety of uses, which may overlap other categories, can give rise to taxable status. In general, the use of assets instrumental in maintaining or aiding the corporation enterprise or activity in the City will create liability. Some examples are (a) *maintaining stockpiles of raw material or inventories*, or (b) owning materials and equipment assembled for construction, or (c) maintaining securities in the City for trading purposes. (Emphasis supplied)

The decision of Finance denying Adirondack an allocation, completely disregards the fact that it is engaged in interstate commerce. In so doing, Finance imposed its tax on the portion of Adirondack's income attributable to its activities outside of the City. The States of Tennessee and Mississippi, as does the City of New York, could impose their taxes on the income of Adirondack apportioned thereto. "Interstate commerce would be subject to the risk of a double tax burden to which intrastate commerce is not exposed, and which the commerce clause forbids. We have repeated held that such a tax is a regulation of, and a burden upon, interstate commerce prohibited by Article I, §8 of the Constitution." *J.D. Adams Manufacturing Co. v. Storen*, 304 U.S. 307, 311 (1938).

The case is to be distinguished from *Moorman Manufacturing Co. v. Bair, Director of Revenue of Iowa*, 437 U.S. 267, 277 (1978) which held that incongruous allocation formulas of several states which resulted in "overlapping" taxes was not an impermissible burden on interstate commerce. Finance did not permit Adirondack any allocation so that its income is subject to the unconstitutional risk of multiple taxation. It is not a question of "overlapping" allocations.

3. The Mere Risk Of Multiple Taxation Invalidates A Tax.

It is the mere *risk* of multiple taxation that invalidates a tax. There does not have to be actual multiple taxation. In *J.D. Adams Manufacturing Co.*, supra, this Court invalidated the tax imposed on a company engaged in interstate and foreign commerce when, in fact, there was no showing that such company was subject to multiple taxation. Thus in *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434 (1979), the Court stated at page 446:

> "Because California's tax in this case creates multiple taxation in fact, we have no occasion here to decide under what circumstances the mere risk of multiple taxation would invalidate a state tax, or whether this

> risk would be evaluated differently in foreign, as opposed to interstate, commerce.

This raised a question but the *dicta* in *Mobil Oil Corp. v. Commissioner of Taxes of Vermont*, 445 U.S. 425 (1980), again indicated that it is the mere risk of multiple taxation that invalidates a tax, when it was stated at page 444, "Inasmuch as New York does not presently tax the dividends in question, actual multiple taxation is not demonstrated on this record . . . We agree with Mobil that the constitutionality of a Vermont tax should not depend on the vagaries of New York tax policy".

Adirondack was engaged in interstate commerce making sales throughout the country and storing the property used to make such sales in the States of New York, Tennessee and Mississippi. Although Adirondack did not pay income taxes to the States of Tennessee and Mississippi, the constitutionality of the denial of the right to allocate should not depend on whether a corporation's income is in fact subject to multiple taxation. It is the mere *risk* of multiple taxation that is unconstitutional. Thus, Finance's determination violates the Commerce Clause (Art. I, §8, Cl. 3) of the United States Constitution.

CONCLUSION

In this case there is the issue as to whether the risk of multiple taxation by several states creates a burden on interstate commerce which violates the Commerce Clause when in fact the corporation did not pay taxes to any other state.

This case could clarify the uncertainty of the law in this regard, particularly in view of the fact that Finance, has an irrational distinction between warehouses in which inventories are stored which violates the Equal Protection Clause and as a result thereof, has subjected the income of a corporation to the risk of multiple state taxation. Furthermore Finance has used a standard to determine whether a corporation is "doing business" in the City which is much broader that that used to determine whether a corporation is "doing business" outside thereof.

Respectfully submitted,

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January 8, 1988

APPENDIX

Statutory Provisions

New York State Enabling Legislation

CITY CORPORATE BUSINESS AND CITY UNINCORPORATED BUSINESS INCOME TAX

Laws 1966, Chapter 772

Effective July 1, 1966.

AN ACT to enable any city having a population of one million or more to raise tax revenue by authorizing the imposition of taxes on general, financial, insurance and transportation corporations and on unincorporated business to provide for the administration and review of such new taxes, to provide for the suspension of any tax on gross income of conduit companies imposed by such city and for the suspension and repeal of any general business and financial tax imposed by any such city, to amend the tax law in relation to authorizing an increase in the rates of tax which such city may impose on utilities and vendors of utility services, and to repeal article two-B of the general city law, authorizing the imposition of a general business and financial tax by such city.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. [Authorization of tax]. Notwithstanding any other provision of law to the contrary, any city having a population of one million or more, acting through its local legislative body, is hereby authorized and empowered to adopt and amend local laws imposing for any such city taxes on general corporations, financial corporations, insurance corporations and transportation corporations. The terms of such local laws shall be, substantially, as follows except that the

appendix in such local laws may be amended for the purpose of conforming it with the United States internal revenue code or other federal laws relating to taxation as presently in effect or as they may be amended:

City Business Tax

Model Local Law

• • •

PART II—GENERAL CORPORATION TAX

§3. Imposition of tax; exemptions

1. For the privilege of doing business in the city in a corporate or organized capacity for all or any part of each of its fiscal or calendar years, every domestic or foreign corporation, except corporations specified in subdivision four of this section, shall annually pay a tax, upon the basis of its entire net income, or upon such other basis as may be applicable as hereinafter provided, for such fiscal or calendar year or part thereof, on a report which shall be filed, except as hereinafter provided, on or before the fifteenth day of March next succeeding the close of each such year, or, in the case of a taxpayer which reports on the basis of a fiscal year, within two and one-half months after the close of such fiscal year, and shall be paid as hereinafter provided.

• • • • •

§4. Computation of Tax

• • • • •

3. The portion of the entire net income of a taxpayer to be allocated within the City shall be determined as follows:

(a) multiply its business income by a business allocation percentage to be determined by

* * * * *

(4) adding together the percentages so determined and dividing the result by the number of percentages; provided, however, that if the taxpayer does not have a regular place of business outside the city other than a statutory office, the business allocation percentage shall be one hundred per centum;

* * * * *

The Administrative Code of City of New York

New York City General Corporation Tax

§R46-3.0 **Imposition of tax; exemptions.—**

1. For the privilege of doing business, or of employing capital, or of owning or leasing property in the city in a corporate or organized capacity, or of maintaining an office in the city, for all or any part of each of its fiscal or calendar years, every domestic or foreign corporation, except corporations specified in subdivision four of this section, shall annually pay a tax, upon the basis of its entire net income, or upon such other basis as may be applicable as hereinafter provided. for such fiscal or calendar year or part thereof, on a report which shall be filled,* except as hereinafter provided, on or before the fifteenth day of March next succeeding the close of each such year, or, in the case of a taxpayer which reports on the basis of a fiscal year, and shall be paid as hereinafter provided.

2. A corporation shall not be deemed to be doing business, employing capital, owning or leasing property,

* So in original.

Administration Code of City of New York (Continued)

or maintaining an office in the city, for the purposes of this part, by reason of (a) the maintenance of cash balances with banks or trusts companies in the city, or (b) the ownership of shares of stock or securities kept in the city, if kept in a safe deposit box, safe, vault or other receptacle rented for the purpose, or if pledged as collateral security, or if deposited with one or more banks or trust companies, or brokers who are members of a recognized security exchange, in safekeeping or custody accounts, or (c) the taking of any action by any such bank or trust company or broker, which is incidental to the rendering of safekeeping or custodian service to such corporation, or (d) the maintenance of an office in the city by one or more officers or directors of the corporation who are not employees of the corporation if the corporation otherwise is not doing business in the city, and does not employ capital or own or lease property in the city, or (e) the keeping of books or records of a corporation in the city if such books or records are not kept by employees of such corporation and such corporation does not otherwise do business, employ capital, own or lease property or maintain an office in the city, or (f) any combination of the foregoing activities.

* * * * *

§R46-4.0 **Computation of tax.—**

1. For taxable years beginning on or after January first, nineteen hundred seventy-eight, the tax imposed by subdivision one of section R46-3.0 of this part shall be, in the case of each taxpayer: (a) a tax (1) computed at the rate of nine per centum of its entire net income or the portion of such entire net income located within the city as hereinafter provided,

* * * * *

Administration Code of City of New York (Continued)

3. The portion of the entire net income of a taxpayer to be allocated within the city shall be determined as follows:

(a) multiplying its business income by a business allocation percentage to be determined by

* * * * *

4. adding together the percentages so determined and dividing the result by the number of percentages; provided, however, that if the taxpayer does not have a regular place of business outside the city other than a statutory office, the business allocation percentage shall be one hundred per centum;

* * * * *

FEDERAL STATUTES

STATE TAXATION OF INCOME FROM INTERSTATE COMMERCE (P.L. 86-272 (S.2524), eff. 9-14-59)

TITLE I – IMPOSITION OF MINIMUM STANDARD

§101 (a) No State, or political subdivision thereof, shall have power to impose, for any taxable year ending after the date of the enactment of this Act, a net income tax on the income derived within such State by any person from interstate commerce if the only business activities within such State by or on behalf of such person during such taxable year are either, or both of the following:

(1) the solicitation of orders by such person, or his representative, in such State for sales of tangible personal property, which orders are sent outside the State for approval or rejection, and, if approved, are filled by shipment or delivery from a point outside the State; and

(2) the solicitation of orders by such person, or his representative, in such State in the name of or for the benefit of a prospective customer of such person, if orders by such customer to such person to enable such customer to fill orders resulting from such solicitation are orders described in paragraph (1).

(b) The provisions of subsection (a) shall not apply to the imposition of a net income tax by any State, or political subdivision thereof, with respect to-

(1) any corporation which is incorporated under the laws of such State; or

(2) any individual who, under the laws of such State, is domiciled in, or a resident of, such State.

(c) For purposes of subsection (a), a person shall not be considered to have engaged in business activities within a State

during any taxable year merely by reason of sales in such State, or the solicitation of orders for sales in such State, or the solicitation of orders for sales in such State, of tangible personal property on behalf of such person by one or more independent contractors, or by reason of the maintenance of an office in such State by one or more independent contractors whose activities on behalf of such person in such State consist solely of making sales, or soliciting orders for sales, of tangible personal property.

(d) For purposes of this section-(1) the term "independent contractor" means a commission agent, broker, or other independent contractor who is engaged in selling, or soliciting orders for the sale of, tangible personal property for more than one principal and who holds himself out as such in the regular course of his business activities; and (2) the term "representative" does not include independent contractor.

§102. (a) No State, or political subdivision thereof, shall have power to assess, after the date of the enactment of this Act, any net income tax which was imposed by such State or political subdivision, as the case may be, for any taxable year ending on or before such date, on the income derived within such State by any person from interstate commerce, if the imposition of such tax for a taxable year ending after such date is prohibited by section 101.

(b) The provisions of subsection (a) shall not be construed-(1) to invalidate the collection, on or before the date of the enactment of this Act, of any net income tax imposed for a taxable year ending on or before such date, or (2) to prohibit the collection, after the date of the enactment of this Act, of any net income tax which was assessed on or before such date for a taxable year ending on or before such date.

§103. For purposes of this title, the term "net income tax" means any tax imposed on, or measured by, net income.

§104. If any provision of this title or the application of such provision to any person or circumstance is held invalid, the

remainder of this title or the application of such provision to persons or circumstances other than those to which it is held invalid, shall not be affected thereby.

* * *

DECISION OF THE NEW YORK CITY
DEPARTMENT OF FINANCE

THE CITY OF NEW YORK
DEPARTMENT OF FINANCE
BUREAU OF HEARINGS
225 BROADWAY
NEW YORK, N.Y. 10007

CITY OF NEW YORK
DEPARTMENT OF FINANCE

FHD (82) - GC - 8/85 (C
General Corporation Tax

In the Matter of the Petition

of

ADIRONDACK CHAIR COMPANY, INC. DECISION

for Redetermination of a Deficiency of General Corporation Tax under Title R of Chapter 46 of the Administrative Code of the City of New York for the periods ending September 30, 1979, December 31, 1979, December 31, 1980 and December 31, 1981.

Petitioner, Adirondack Chair Company, Inc., 219 East 42nd Street, New York, New York 10017, filed a petition for redetermination of a deficiency of general corporation tax under Title R of Chapter 46 of the Administrative Code of the City of New York for the tax periods ending September 30, 1979, December 31, 1979, December 31, 1980 and December 31, 1981.

A hearing was held before Warren Hauben, Hearing Officer, at the offices of the Department of Finance, 225 Broadway, New York, New York on March 28 and June 28, 1984. Petitioner appeared by Hutton and Solomon (Stephen Solomon, Esq. and Roy F. Hutton, Esq., of counsel). The Department of Finance appeared by Maria T. Jones, Esq. (Ramon Cintron, Esq., and Donna Krystal, Esq., of counsel).

General Corporation Tax

ISSUES

I. Whether the out-of-city plants of Adirondack Chair Co., Inc.'s furniture suppliers, at which petitioner kept inventory, constituted regular places of business of Adirondack so as to permit the allocation of business income.

II. If so, whether petitioner is entitled to a refund of general corporation tax for the period ending September 30, 1979.

FINDINGS OF FACT

1. Petitioner, Adirondack Chair Co., Inc. is in the business of mail order furniture and maintains its principal business office, a warehouse, and a showroom in New York City.

2. Petitioner filed General Corporation Tax Returns for the periods ending September 30, 1979, December 31, 1979, 1980 and 1981, and paid the tax shown as due on each return.

3. On each return filed, petitioner completed Schedule G, for the allocation of business income within and without the City, as follows:

Period Ending:	9/30/79	12/31/79	12/31/80	12/31/81
Property factor	100%	78.291%	84.723%	98.4628%
Receipts factor	12.63%	12.5818%	14.5746%	22.5323%
Wage factor	100%	100%	100%	100%
Total	212.63%	190.88%	199.2976%	220.9951%
Business Allocation Percentage (Divided by three)	70.88%	63.62%	66.43%	73.6650%

4. The instructions on the return for Schedule G indicate that if a business allocation is claimed, Schedule H, where business locations are to be listed, is to be completed. Petitioner never completed Schedule H.

5. On September 2, 1983, as a result of an audit, the Department of Finance issued to petitioner a Notice of Determination asserting a deficiency of general corporation tax in the principal amount of $79,116.07, plus interest, for the period October 1, 1978 through December 31, 1981.

6. The basis for the deficiency is the auditor's disallowance of petitioner's claimed out of city offices and allocation of 100% of petitioner's business income to New York City for each of the periods under review.

7. Petitioner contends that it had regular places of business in Tupelo, Mississippi and Knoxville, Tennessee at the plants of two of its suppliers, Krueger Metal Company, Inc. and Overman, U.S.A. Inc. Petitioner argues that it stored inventories of its merchandise at said locations.

8. Petitioner also contended, at the close of the hearing, that it was entitled to a refund, in an unspecified amount, for the period ending September 30, 1979 because it erroneously completed its Genera Corporation Tax Return.

9. Petitioner did not have any employees outside of New York City.

10. All orders for petitioner's furniture were processed through the New York City office. During the audit period, most of the mail-ordered furniture was delivered to customers located outside New York State from petitioner's suppliers in Mississippi and Tennessee.

11. During the audit period, petitioner regularly purchased office furniture from Overman, U.S.A. in order to have a supply of items constantly in demand on hand. Overman sent petitioner invoices which noted that items were purchased for stock. Adirondack would pay the invoiced amount. When it received an order, Adirondack would issue an invoice to Overman to ship merchandise to Adirondack's customers. Each month, Overman would write to Adirondack regarding orders which had been shipped and listing Adirondack's stock in Overman's warehouse.

12. Petitioner failed to adduce any evidence that the merchandise purchased from Overman was stored in space rented by petitioner or that the merchandise was otherwise kept separate or identifiable.

13. From 1979 until sometime in 1981, petitioner was a subsidiary of Krueger Metal Products, Inc. Krueger was petitioner's biggest supplier throughout the audit period. Petitioner made two payments of $300.00 to Krueger in November and December, 1981, after Krueger started billing petitioner for rental of a storage bay in Tupelo, Mississippi. No lease agreement or storage agreement concerning the Tupelo location was produced at the hearing. There is no indication that petitioner had separate space or that its goods were kept separate or were otherwise identifiable. Nor is there any indication that petitioner, in November or December 1981, had the exclusive right to, or exercised any control over, specific space in Krueger's plant.

14. Petitioner conceded that neither of the locations claimed as regular places of business were public warehouses.

15. Petitioner did not introduce any evidence that it filed business tax returns or paid tax in any jurisdiction outside of New York, or that it held itself out as doing business in any location other than New York City.

CONCLUSIONS OF LAW

A. That section R46-3.0 of the Administrative Code imposes a general corporation tax for "the privilege of doing business, or of employing capital, or of owning or leasing property in the city in a corporate or organized capacity, or of maintianing an office in the city..."

B. That section R46-4.0.3(a) provides for the allocation of business income within and without the city, but provides however, at subdivision (a)(4):

> ...that if the taxpayer does not have a regular place of business outside the city other than a statutory office,

> the business allocation percentage shall be one hundred per centum...

C. That general corporation tax regulation section 4-11(b) defines regular place of business as follows:

> A regular place of business is any bona fide office (other than a statutory office) factory, warehouse, or other space which is regularly used by the taxpayer in carrying on its business. Where as a regular course of business, property of the taxpayer is stored by it in a public warehouse until it is shipped to customers, such warehouse is considered a regular place of business of the taxpayer and, where as a regular course of business, raw material or partially finished goods of a taxpayer are delivered to an independent contractor to be converted, processed finished or improved, and the finished goods remain in the possession of the independent contractor until shipped to customers, the plant of such independent contractor is considered a regular place of business of the taxpayer...

D. That section 4-11(b) clearly indicates that in circumstances where the warehousing of finished goods outside of New York City is the basis upon which the allocation of business income is premised, the warehousing activities must occur either at a site maintained by the taxpayer itself or in a public warehouse.

E. That neither of the locations at which petitioner stored goods if a public warehouse. Furthermore, petitioner's payments to Krueger Metal Products, Inc., for November and December 1981, standing alone, are insufficient to establish that petitioner maintained a warehouse facility in Tupelo, Mississippi during 1981.

F. That petitioner did not have a regular place of business outside of New York City during the audit period within the meaning of section R46-4.0.3(a) and Regulation section 4-11(b).

G. That in view of Conclusion of Law "F", there is no need to consider petitioner's claim for refund for the period ending

September 30, 1979. In any event, petitioner failed to meet its burden of proof under §R46-70.0.5 that it is entitled to a refund.

H. That the petition and claim for refund of Adirondack Chair Company, Inc. is denied and the Notice of Determination issued on September 2, 1983 is sustained.

DATED: NEW YORK, NEW YORK
August 13, 1985

S/ Kenneth E. Demario
Kenneth E. Demario
Director, Hearings Bureau

/bh

ORDER OF THE APPELLATE DIVISION OF THE SUPREME COURT

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on April 9, 1987

Present—Hon. Theodore R. Kupferman, Justice Presiding
Leonard H. Sandler
Sidney H. Asch
E. Leo Milonas
Ernst H. Rosenberger, Justices.

In the Matter of the Application of
ADIRONDACK CHAIR CO., INC.

Petitioner,

—against—

COMMISSIONER OF FINANCE OF THE CITY OF NEW YORK,

Respondent. 29685

To Review, pursuant to Article 78 of the Civil Practice Law and Rules, a Final Determination of Petition For Redetermination of a Deficiency of General Corporation Tax under Title R of Chapter 46 of the Administrative Code of the City of New York for periods ended September 30, 1978, December 31, 1979, December 31, 1980 and December 31, 1981.

The above-named petitioner having moved at Special Term of the Supreme Court, New York County, pursuant to Article 78 of the Civil Practice Law and Rules, for a review by the court of a determination of the respondent dated August 15, 1985,

And this proceeding having been transferred by order of said court, entered on February 21, 1986 (Michael Dontzin, J.), to this Court for review and determination,

And said proceeding having duly come on to be heard before this Court and having been argued by Richard C. Agins, Stephen L. Solomon and Myron Weinberg of counsel for the petitioner, and by Anshel David and Glenn Newman of counsel for the respondent; and due deliberation having been had thereon,

It is unanimously ordered that the determination of the respondent be and the same hereby is confirmed, without costs and without disbursements. The clerk is directed to enter judgment in favor of respondent, confirming the determination.

ENTER: HAROLD J. REYNOLDS
Clerk

ORDER OF THE COURT OF APPEALS

STATE OF NEW YORK, COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the fifteenth *day of* October *A.D.* 1987

Present, HON. SOL WACHTLER, *Chief Judge, presiding.*

1-10 Mo. No. 970
In the Matter of Adirondack Chair Co., Inc.,

Appellant,

vs.

Commissioner of Finance of the City of New York,

Respondent.

A motion for leave to appeal to the Court of Appeals in the above cause having been heretofore made upon the part of the appellant herein and papers having been submitted thereon and due deliberation thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied with twenty dollars costs and necessary reproduction disbursements.

s/ Donald M. Sheraw

Donald M. Sheraw
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION-FIRST DEPARTMENT

New York County Clerk's Index No. 29123/85

----------X

Application of ADIRONDACK CHAIR CO., INC.,

Appellant,

—against—

COMMISSIONER OF FINANCE OF THE CITY OF NEW YORK,

Respondent.

To Review, pursuant to Article 78 of the Civil Practice Law and Rules, a Final Determination of Petition for Redetermination of a Deficiency of General Corporation Tax under Title R of Chapter 46 of the Administrative Code of the City of New York for the periods ended September 30, 1979, December 31, 1979, December 31, 1980 and December 31, 1981.

----------X

NOTICE OF APPEAL

Notice is hereby given that Adirondack Chair Co., Inc., the petitioner above-named, hereby appeals to the Supreme Court of the United States from the judgment of the Supreme Court of the State of New York, Appellate Division, First Department (New York County Clerk's Index Number 29123/85), dismissing the petition, entered on April 9, 1987, in a proceeding brought pursuant to Article 78 of the New York Civil Practice Law and Rules which became a final judgment on October 15, 1987 upon entry of the order of the Court of Appeals of the State of New York denying appellant's motion for leave to appeal.

This appeal is taken pursuant to 28 U.S.C. §1257(2).

Dated: New York, New York
December 22, 1987

Yours, etc.

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(212) 682-5702
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Adirondack Chair Co., Inc.

TO: Peter L. Zimroth, Esq.
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Hon. Harold J. Reynolds
Clerk of the Supreme Court,
Appellate Division
27 Madison Avenue
New York, N.Y. 10010

The Clerk of New York County
60 Centre Street
New York, N.Y. 10007

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION-FIRST DEPARTMENT

New York County Clerk's Index No. 29123/85

----------X

Application of ADIRONDACK CHAIR CO., INC.,

Appellant,

– against –

COMMISSIONER OF FINANCE OF THE CITY OF NEW YORK,

Respondent.

To Review, pursuant to Article 78 of the Civil Practice Law and Rules, a Final Determination of Petition for Redetermination of a Deficiency of General Corporation Tax under Title R of Chapter 46 of the Administrative Code of the City of New York for the periods ended September 30, 1979, December 31, 1979, December 31, 1980 and December 31, 1981.

----------X

AFFIDAVIT OF SERVICE

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

MYRON WEINBERG, being duly sworn deposes and says:

1. I am an attorney duly admitted to practice law before the courts of this state.

2. On December 22, 1987, I served a copy of the within Notice of Appeal to the Supreme Court of the United States upon the office of the Corporation Counsel of the City of New York, 100 Church Street, New York, New York 10007, by placing said

Notice of Appeal in a securely wrapped first class postage-paid envelope addressed to the said office at the aforesaid address, and thereafter deposited same in an official depository under the exclusive care and custody of the United States Postal Service within New York State.

3. All parties required to have been served by the rules of the Supreme Court of the United States have been served with said Notice of Appeal.

s/ Myron Weinberg
MYRON WEINBERG

Sworn to before me this
22nd day of December, 1987

s/ Deborah J. Neal
NOTARY PUBLIC

DEBORAH J. NEAL
Notary Public, State of New York
No. 03-4768256
Qualified in Bronx County
Term Expires July 31, 1988

(2)

FILED
MAR 3 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1173

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

APPLICATION OF ADIRONDACK CHAIR CO., INC.,

Appellant,

-against-

COMMISSIONER OF FINANCE OF THE CITY OF NEW YORK,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, FIRST JUDICIAL DEPARTMENT

MOTION TO DISMISS

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EDITH I. SPIVACK,
GLENN NEWMAN,
STANLEY BUCHSBAUM,
ANSHEL DAVID,

of Counsel.

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No. 87-1173

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

APPLICATION OF ADIRONDACK
CHAIR CO., INC.,

Appellant,

-against-

COMMISSIONER OF FINANCE OF THE
CITY OF NEW YORK,

Appellee.

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF NEW YORK, APPELLATE
DIVISION, FIRST JUDICIAL DEPARTMENT

MOTION TO DISMISS

Appellee moves to dismiss this appeal because of the absence of any federal question or on the ground that none of the questions in the Jurisdictional Statement presents a substantial federal question.

PRELIMINARY STATEMENT

This appeal is from an order of the Appellate Division of the Supreme Court, First Department, of the State of New York, dated and entered April 9, 1987, which confirmed the determination of appellee Commissioner of Finance of the City of New York (15a-16a)*. By order entered October 15, 1987, the Court of Appeals denied appellant's motion for leave to appeal to that Court (17a).

The order confirmed a tax determination based on a hearing officer's report which found that appellant did not have a regular place of business outside New York City.

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the New York City General Corporation Tax law and New York

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* Rferences in parentheses are to pages in Appellant's Jurisdictional Statement.

State enabling legislation authorizing it appear at pp. 1a-5a of the Jurisdictional Statement. The New York City regulation, General Corporation Tax Regulation 4-11(b), which provides that a warehouse outside the City regularly used by the taxpayer shall constitute a regular place of business, appears at p.6.

STATEMENT OF THE CASE

(1) Notice of deficiency.

On September 2, 1983, the Department of Finance issued to appellant a Notice of Determination asserting a deficiency in New York City General Corporation Tax in the principal amount of $79,116.07, plus interest, for the period from October 1, 1978 through December 31, 1981. The deficiency resulted from disallowance of appellant's allocation of a portion of its net income outside of New York City.

As provided by statute, an evidentiary hearing on the deficiency was held before a

referee designated by appellee, the City's Commissioner of Finance.

(2) The evidence presented at the hearing before respondent.

Appellant's evidence established that: a) it was in the business of selling office furniture by catalog to mail order customers; b) its sole office was in New York City; c) it had no employees outside New York City; d) it did not hold itself out as doing business at any location outside the City; and e) it paid no state or local taxes outside New York.

All the furniture sold by appellant was manufactured by its two out-of-city suppliers. Overman, USA, was located in Knoxville Tennessee. The other, of which appellant was a subsidiary, Krueger Metal Products, Inc., was located in Green Bay, Wisconsin and Tupelo, Mississippi. Appellant's evidence in regard to Overman related to the entire audit period. Its evidence with regard to Krueger, however,

related only to November and December of 1981, the final two months of the thirty-nine month audit period.

Appellant's claim that it was entitled to allocate income outside the City was based on its purchases "for stock" from its two suppliers. The evidence showed that payments were made to the suppliers for certain items which were specified by description and model number. Those items were not shipped at the time of payment, but were listed by both appellant and supplier as items of appellant's "inventory" held by the supplier. From time to time, appellant would transmit customer orders for "inventory" items to the suppliers, who would thereupon ship the specified item directly to appellant's customer at no additional cost to appellant.

Appellant made no claim that its "inventory" goods were identified or segregated from the other merchandise of either of its suppliers at any time prior to shipment to appellant's

customers. Indeed, appellant's corporate treasurer, its sole witness, testified that he was unaware of any segregation of appellant's merchandise at the Overman plant. (This testimony appears at pp. 133-34 of the Record on Review that was before the Appellate Division.) No payments were made to Overman for use of any storage facilities and there was no evidence that Overman set aside any identifiable space for storage of appellant's merchandise.

Appellant did make payments for use of a storage bay at the Krueger warehouse in Tupelo for November and December of 1981. No such evidence was submitted for any earlier period. The storage bay was denominated the "Adirondack Storage Bay" in the invoices submitted by Krueger to petitioner. However, as in the case of Overman, there was no direct evidence of identification or segregation of specific goods.

(3) Respondent's findings and conclusions.

Based on the foregoing evidence, the City's Commissioner of Finance concluded that appellant was not entitled to allocate income to either of its suppliers' warehouses outside New York City. The written decision of the hearing officer appears at pp. 9a-15a of the Jurisdictional Statement. As to Overman, he found (12a, ¶12):

> [Appellant] failed to adduce any evidence that the merchandise purchased from Overman was stored in space rented by [appellant] or that the merchandise was otherwise kept separate or identifiable.

Similarly, as to Krueger, he found (12a, ¶13):

> No lease agreement or storage agreement concerning the Tupelo location was produced at the hearing. There is no indication that [appellant] had separate space or that its goods were kept separate or were otherwise identifiable. Nor is there any indication that [appellant], in November or December 1981, had the exclusive right to, or exercised any control over,

> specific space in Krueger's plant.

The hearing officer further concluded as to Krueger, that appellant's payments for use of a storage bay in November and December of 1981 were insufficient to establish regular use of a warehouse during 1981 (13a, ¶E).

Finally, he found that (12a,¶15):

> [Appellant] did not introduce any evidence that it filed business tax returns or paid tax in any jurisdiction outside of New York, or that it held itself out as doing business in any location other than New York City.

In light of the foregoing findings, the Commissioner of Finance concluded that appellant did not regularly use a warehouse outside the City within the meaning of General Corporation Tax Regulation 4-11(b) and, therefore, assessed appellant for the tax deficiency asserted in the Notice of Determination (13a, ¶¶ D,E,F,G).

The Appellate Division of the Supreme Court, First Department, confirmed the

Commissioner's determination (15a-16a). Appellant then made an application to the Court of Appeals for leave to appeal to that Court. The motion was denied (17a).*

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* It should be noted that the appellant made no attempt to appeal as of right to the New York Court of Appeals although the governing law authorizes such an appeal in a case "where there is directly involved the construction of the constitution of the state or of the United States." New York Civil Practice Law and Rules, §5601(b)(1).

ARGUMENT

JURISDICTION IS LACKING BECAUSE THE RECORD FAILS TO DEMONSTRATE THAT THE NEW YORK COURTS DECIDED THE FEDERAL ISSUE RAISED BY APPELLANT.

(1)

Appellant is challenging a tax determination of the Commissioner of Finance, rendered after an evidentiary hearing, which denied it the right to allocate corporate net income outside New York City pursuant to the City's General Corporation Tax statute and pertinent regulations. The statute permits allocation of income only where the taxpayer has "a regular place of business outside the City." The regulations provided that a warehouse "regularly used" by the taxpayer may constitute a regular place of business for allocation purposes. Appellant sought to allocate income on the basis of assertions that it regularly maintained stocks of merchandise outside the

City. The hearing officer rendered a written decision which was confirmed without opinion by the Appellate Division. The Court of Appeals denied appellant's motion for leave to appeal without opinion.

Appellant does not now challenge the facial constitutionality of either the statute or the regulation applicable to warehouses. Rather, it bases this appeal on a statement appearing in the Conclusions of Law in this case that (13a, ¶D):

> where the warehousing of finished goods outside New York City is the basis upon which allocation of business income is premised, the warehousing activities must occur either at a site maintained by the taxpayer itself or in a public warehouse.

Appellant asserts that this formulation requires that the taxpayer perform affirmative acts with respect to the warehouse site beyond mere "regular use" and that such a requirement

contravenes the commerce and equal protection clauses.

(2)

Appellant fails to demonstrate that the New York courts, in sustaining the tax determination, endorsed the foregoing formulation of the meaning of the regulation as set forth in the Conclusions of Law. On the contrary, the record clearly shows that there is little likelihood the New York courts addressed this issue.

The findings of fact, which were part of the written decision, all indicate that appellant failed to establish its factual claim that it maintained merchandise at its suppliers' locations outside the City. The Commissioner found that appellant's suppliers did not separately identify or segregate specific items of merchandise as appellant's inventory, that the suppliers did not regularly set aside specific spaces for storage of appellant's goods, and that appellant did not regularly make rental payments for storage space

at the suppliers' locations. In addition, the Commissioner found that appellant paid no taxes in Tennessee or Mississippi, where the suppliers were located, even though both states had corporate franchise taxes which would have been applicable. On the basis of these findings, which were fully supported by the evidence in the record, the Commissioner of Finance concluded that appellant did not have any regular places of business outside the City.

The sole argument in our brief before the Appellate Division was that the administrative determination must be sustained because the factual findings, which were undisputed, clearly established that appellant did not maintain any inventories outside the City. Our brief expressly argued that it was unnecessary for the courts to address appellant's federal constitutional claims. In light of the factual findings, substantiated by the lack of evidence to the contrary, appellant could not be found to

have a regular place of business outside the City under any possible interpretation of the governing regulation. In view of this state of facts there is no valid ground for appellant's argument in its Jurisdictional Statement that the New York courts based their decisions on a constitutionally impermissible distinction between different types of warehouses.

Thus, this case must be dismissed for lack of jurisdiction since the record fails to establish that the issue presented for review by appellant was decided by the courts of New York State. 28 U.S.C. §1257; Exxon Corp. v. Eagerton, 462 U.S. 183 (1983); Street v. New York, 394 U.S. 576, 581-82 (1969); Cardinale v. Louisiana, 394 U.S. 437, 438 (1969); Bailey v. Anderson, 326 U.S. 203, 206-07 (1945); Whitney v. California, 274 U.S. 357 (1927).

Conclusion

The appeal should be dismissed for want of a substantial federal question.

Dated: March 4, 1988

Respectfully submitted,

PETER L. ZIMROTH,
Counsel for Appellee,
Corporation Counsel of
the City of New York.

EDITH I. SPIVACK,
GLENN NEWMAN,
STANLEY BUCHSBAUM,
ANSHEL DAVID,

of Counsel.

Supreme Court, U.S.
FILED
MAR 11 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1173

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

APPLICATION OF ADIRONDACK CHAIR CO., INC.,

Appellant,

v.

COMMISSIONER OF FINANCE,
OF THE CITY OF NEW YORK,

Appellee.

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF NEW YORK, APPELLATE DIVISION,
FIRST JUDICIAL DEPARTMENT

BRIEF OPPOSING MOTION TO DISMISS

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No. 87-1173

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

APPLICATION OF ADIRONDACK CHAIR CO., INC.,

Appellant,

v.

COMMISSIONER OF FINANCE,
OF THE CITY OF NEW YORK,

Appellee.

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF NEW YORK, APPELLATE DIVISION,
FIRST JUDICIAL DEPARTMENT

BRIEF OPPOSING MOTION TO DISMISS

The Appellee, the Commissioner of Finance of the City of New York, rendered a decision that the Appellant, Adirondack Chair Co., Inc., was not entitled to allocate any part of its income outside of the City although it was "doing business" outside of the City by regularly storing inventories in other states from which deliveries were made to customers throughout the country since the place where the inventories were stored was neither a public warehouse nor a place of business that it maintained. (Decision of Commissioner of Finance,

Conclusions of Law D., E. and F., JS, 13a[1]). This decision was confirmed without opinion by the New York Supreme Court, Appellate Division, First Judicial Department and this appeal is taken from Order of such court. (JS, 15a) The Appellant then made a Motion For Leave To Appeal to the New York Court of Appeals which was denied without opinion. (JS, 17a)

In his Motion To Dismiss, the Appellee, in an attempt to preclude a review by this Court of the Constitutional issues involved herein, has raised a non-existent factual issue by erroneously stating that such decision was predicated on the fact that the Appellant did not maintain inventories outside of the State since it failed to prove that such merchandise was kept separate and identifiable by the bailee. To the contrary, the Appellee in its decision made numerous Findings of Fact and Conclusions of Law which clearly indicate that such merchandise was the property of the Appellant. (JS, 11a, 12a and 13a)

A. *The Appellees Assertion Of A Factual Issue As To The Ownership of Inventories Stored Outside Of New York Is Merely A "Red Herring" Which Is To Be Disregarded*

There never was any issue raised in this matter by the Appellee as to the ownership of such inventories, either at the Formal Hearing or in his decision (JS, 9a to 14a). There is not one Finding of Fact or Conclusion of Law in said decision, indicating that the Appellant did not regularly store its inventories outside of the State. It was stated therein that the issue involved in the Formal Hearing, was:

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[1]JS refers to Appellant's Jurisdictional Statement and number is the page thereof.

> "I. Whether the out-of-city plants of Adirondack Chair Co., Inc.'s furniture suppliers, at which petitioner kept inventory, constituted regular places of business of Adirondack so as to permit the allocation of business income." (Emphasis supplied.)

That is a clear acknowledgement by the Appellee that the Appellant maintained inventories outside of the City. Moreover, since inventories are an income determining factor,[2] the taxable income of the Appellant would have had to have been adjusted to exclude from the computation thereof, any amounts attributable to merchandise which was found not to be the property of the Appellant and no such adjustment was made. There never was any question, allegation or finding that such inventories were not the property of the Appellant either at the Formal Hearing or in the decision, thereon.

Not only was there no question as to the ownership of such inventory but there were numerous statements in the decision indicating the Appellant's ownership thereof. In Findings of Fact 11 and 12 (JS, 11a and 12a), it is clearly stated that the Appellant "purchased" the inventory stored at the supplier's premises:

> "11. During the audit period, petitioner regularly purchased office furniture from Overman, U.S.A. in order to have a supply of items constantly in demand on hand. Overman sent petitioner invoices which

---

[2]Regulation §1.471-1 under §471 of the Internal Revenue Code (26 U.S.C. §471), "Need for inventories - In order to reflect taxable income correctly, inventories at the beginning and end of each taxable year are necessary in every case in which the production, purchase or sale of merchandise is an income-producing factor."

noted that items were purchased for stock. Adirondack would pay the invoiced amount. When it received an order, Adirondack would issue an invoice to Overman to ship merchandise to Adirondack's customers. Each month, Overman would write to Adirondack regarding orders which had been shipped and listing Adirondack's stock in Overman's warehouse.

12. Petitioner failed to adduce any evidence that the merchandise purchased from Overman was stored in space rented by petitioner or that the merchandise was otherwise kept separate or identifiable. (Emphasis supplied.)

Under §1-201(32) of the New York Uniform Commercial Code the term "purchase" "includes taking by sale, discount, negotiation, mortgage, pledge, lien, issue or re-issue, gift or any other voluntary transaction creating an interest in property".[3] (Emphasis supplied.) Thus, a "purchase" is the acquisition of an interest in property. Under §2-105(2) N.Y.U.C.C. "goods must be both existing and identified before any interest in them can pass.***" Thus, when the Appellee stated that the Appellant purchased merchandise it must be assumed that he was knowledgeable that such term, as defined by the laws of this State, means that the Appellant had a property interest in the inventories and that, of necessity, to have acquired such interest, the inventories must have been in existence and identified.

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[3]Although the inventories involved herein were purchased and stored outside of New York, the various terms should be defined by reference to the laws of the State of New York, since the tax is imposed under the authority of the laws of such State. Furthermore, while the Appellee must be knowledgeable of the New York Uniform Commercial Code, he cannot be expected to know the laws of other states.

The only references to the words "separate" and "identifiable" in the entire decision are made in Findings of Fact 12 and 13 of the Appellee's decision. (JS, 12a) Both of these Findings clearly state that the Appellant owned the merchandise stored at the sites of the suppliers but that there was no evidence that the Appellant's property was kept separate or identifiable. This reference to "separate and identifiable" is to the storage of the inventories and not as to fact of ownership. Whether or not such inventories were kept in a separate space or were otherwise segregated, is of no importance since the bailees could not have terminated the Appellant's property interest therein by failing to segregate such property.[4]

At the Formal Hearing of the Appellee and in his decision, he always acknowledged and admitted that the Appellant stored its inventory outside of New York. It is the ownership of such inventory that gives rise to the Constitutional issues involved herein. The decision of the Appellee was that the Appellant was not entitled to an allocation as being engaged in a multi-state business although it made sales of merchandise to customers outside of New York from inventories which were also stored outside of the State. The Appellee has invented a factual issue as to ownership of the property stored outside of New York as a "red herring" to prevent this Court from deciding the important Constitutional issues involved herein. The Appellee's decision was predicated solely on basis that the inventories were stored at the warehouse of suppliers which were not public warehouses.

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[4]Since there was a finding in Finding of Fact 11 (J.S., 11a) that there was a monthly listing of "Adirondack's stock in Overman's warehouse", it would seem there must have been some segregation or identification of the "stock" to permit the preparation of such listing.

B. *This Court Has Jurisdiction Since Constitutional Issues Are Federal Questions*

The Appellee contends that this Court does not have jurisdiction in this matter since there was no determination as to any Constitutional issue in the New York Courts. Inasmuch as the New York Courts, respectively, confirmed the decision of the Appellee without opinion and denied the Motion For Leave To Appeal, again without opinion, no one knows whether or not there was a determination as to any issue. Accordingly, the Appellant could not (as stated by the Appellee, at page 14 of its Motion To Dismiss) argue in its Jurisdictional Statement that "the New York courts based their decisions on a constitutionally impermissible distinction between different types of warehouses." It was the Appellee who made such distinction in his decision -- it was not the decision of the courts. The silence of the courts is indicative of nothing. It is certainly presumptuous on the part of the Appellee, to suggest that the Courts must have sustained his decision solely on the basis of the factual findings because this was his sole argument in his brief before the Appellate Division (Appellee's Motion To Dismiss, page 13).

The Appellant contended that there were constitutional issues involved in this matter, in both its brief and reply brief in the Appellate Division and the arguments with respect thereto consumed about 20% to 25% of the space of the arguments therein. In the affidavit attached to the Motion For Leave To Appeal to the New York Court of Appeals, approximately 20% to 25% of the space therein was devoted to the Constitutional issues. The mere fact that the Appellant did not request such appeal as a matter of right because of the constitutional issues asserted to be involved, does not mean that the Court of Appeals did not consider such issues. The Appellant made its

constitutional arguments in its Motion and the Court could have found that there were such issues. (See *American Chicle Company v. State Tax Commission*, 8 N.Y.2d 1119 (1960)). Instead, the Court denied the Motion without opinion.

It is clear that the Appellant has in every state court raised the Federal issue. "The issue whether a federal question was sufficiently and properly raised in the state courts is itself ultimately a federal question, as to which this Court is not bound by the decision of the state courts." *(Street v. New York,* 394 U.S. 576, 583, 1969) Thus, it would appear that since the issue was raised in the state courts and any question as to whether such issue was "sufficiently and properly" raised is a Federal question, there is no basis for the Appellee's contention that this Court lacks jurisdiction because of the failure of the New York Courts to make a determination of the Federal issue.

In view of the fact that there are no factual issues involved in this matter and there are substantial Federal questions due to the failure of the Appellee to recognize that the Appellant is engaged in interstate commerce and in fact "doing business" in several states, this Court should grant this appeal.

Respectfully submitted,

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